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Supreme Court, U.S.
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No. 96-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U. KHAN
and KHAN & ASSOCIATES

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below properly decide that a gasoline dealer can demonstrate that he suffered antitrust injury from maximum retail price constraints imposed upon him?

2. Did the court below properly decide that an agreement between a gasoline supplier and a dealer which restricted the dealer's freedom to set retail prices for gasoline was a *per se* violation of the Sherman Act?

3. Did the court below properly determine that the trial court abused its discretion in excluding uncontradicted expert economic evidence establishing antitrust injury in the context of a summary judgment motion?

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REASONS FOR DENYING THE WRIT

Respondents, Barkat U. Khan and Khan & Associates, request that the Petition of State Oil Company for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit be denied.

I.

REVIEW OF THE ISSUES PRESENTED IS NOT WARRANTED

A. There Is No Conflict In Controlling Authority On The Illegality Of Maximum Vertical Resale Price Maintenance

Plaintiffs, Barkat U. Khan and Khan & Associates, challenged an agreement under which their ability to set the maximum retail price for gasoline was constrained as illegal under the antitrust laws. The trial court, refusing to apply the *per se* rule, dismissed the action because plaintiffs could not demonstrate antitrust injury.

The court below reinstated plaintiffs' antitrust action because plaintiffs could, under controlling authority, demonstrate antitrust injury arising from the challenged price restraints. Relying on *Albrecht v. Herald Company*, 390 U.S. 145, 88 S.Ct. 869 (1968) and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884 (1990), the court below found that a dealer may suffer antitrust injury when its supplier restricts the ability to freely set the resale price for its products according to the dictates of market forces. This decision is not in conflict with any controlling authority.

In *Albrecht*, this Court held that the action of a newspaper publisher in fixing the maximum price at which its distributors could resell the newspaper was illegal *per se*.

This Court made quite clear that even vertical maximum price fixing is illegal *per se*.

In the court below, State Oil argued that *Albrecht* should be ignored as it was no longer good law. The Seventh Circuit rejected State Oil's invitation to overrule *Albrecht*. The decision to continue to apply *Albrecht* is consistent with the First Circuit's decision in *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiensgesellschaft*, 19 F.3d 745, 752-54 (1st Cir. 1994).

In an effort to avoid this authority, State Oil argues that post-*Albrecht* decisions regarding antitrust injury have superseded *Albrecht*. However, this Court in *Atlantic Richfield* specifically found that dealers, such as plaintiffs, suffered antitrust injury when their ability to freely set prices was constrained by a scheme of vertical maximum resale price maintenance. This Court has determined that the antitrust laws were intended to provide relief for a constrained buyer that loses its ability to compete due to maximum resale price maintenance.

Petitioner cites no conflicting decision. Consequently, this Court has no reason to review the issue in this case.

B. The Court Should Not Reconsider Controlling Precedent In This Case Which Was Decided On A Motion For Summary Judgment

Petitioner, recognizing the overwhelming authority supporting the decision below, requests that *Albrecht* be overturned. However, this case is not the appropriate case for the re-evaluation of *Albrecht*. This case, which was decided in the district court on a motion for summary judgment, does not present the issues in a proper context.

The decision of the Seventh Circuit merely sent this case back to the district court for trial. Respondents must

still present their case to the trier of fact. It is conceivable that the trier of fact will determine on the evidence presented that plaintiffs cannot prove antitrust injury as a matter of fact. In that case, this Court would not be required to address the legal issue of whether antitrust injury could ever arise in a case of vertical maximum resale price maintenance.

Moreover, plaintiffs can still present a rule of reason case to the trier of fact based on their expert economic evidence. Because plaintiffs could prevail on the rule of reason, this case does not clearly present the legal issue of the continued application of the *per se* rule to vertical maximum resale price maintenance.

Given this procedural posture, this Court should not review the issues raised in this case.

II.

THE COURT BELOW FULLY CONSIDERED AND PROPERLY DECIDED THE ISSUES

A. Plaintiff Has Demonstrated Antitrust Injury

Underlying State Oil's argument is the mistaken belief that this Court will restrict the concept of antitrust injury. However, as the court below noted, this Court has consistently adhered to a definition of antitrust injury broader than that espoused by State Oil.

This Court has continued to recognize vertical minimum price fixing as *per se* illegal despite theoretical objections from antitrust economists. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). Since, as this Court recognized in *Albrecht*, the economic effect of vertical maximum price fixing begins to resemble the economic effects of minimum price fixing at certain

price levels, the court below properly held that antitrust injury could exist. No authority suggests that the injury to a dealer in plaintiffs' position is not antitrust injury.

B. The Trial Court Improperly Refused To Consider Plaintiffs' Expert's Opinions

The court below found that the trial court's refusal to consider the expert economic evidence submitted by plaintiffs to be an abuse of discretion. State Oil argues, without citation to any authority, that this economic evidence was inadmissible because there was no explanation of "how he got from the bottom line to the ultimate question". This argument misconstrues the law and the record.

The record, as the court below noted, included the financial records from which plaintiffs' expert determined the cost and revenue figures he used in his analysis. The expert's opinions were generated by the methods an economist would be expected to use in determining profits. No contrary evidence was presented. This evidence satisfies the test established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). Importantly, State Oil can site no case which excluded the type of evidence presented by plaintiffs.

In the absence of any contrary evidence, the court below properly ruled that the trial court's refusal to consider the expert economic evidence was an abuse of discretion.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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